

SOUTH AFRICA / JUDGMENT

West Dunes Properties 142 (Pty) Ltd v Subtinix (Pty) Ltd and Another (94789/2019) [2021] ZAGPPHC 869 (15 November 2021) [2021] ZAGPPHC 869

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

94789/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 94789/2019

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO

REVISED: NO

Date: 15 November 2021
In

the matter between: WEST
DUNES PROPERTIES 142 (PTY) LTD
APPLICANT
and
SUBTINIX
(PTY)
LTD
FIRST RESPONDENT
HENDRICK
RAMOKGOTO MORUA
SECOND RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

and background

[1] In August 2021, the applicant approached this court on an urgent basis seeking an order that the respondents be found guilty of the crime of civil contempt of an order granted by Nonyane AJ ('the Nonyane order') on 17 February 2020. The applicant sought an order committing the second respondent to imprisonment for a period of 3 months, and the suspension of this sentence for one day, to allow the second respondent the opportunity to comply with the terms of the

order. The applicant, in the alternative, sought an order that the first respondent be ordered to comply with the Nonyane order.

[2] In deciding whether the respondents were in contempt of court, this court was required to interpret a settlement agreement concluded between the parties that was made an order of court in terms of the Nonyane order. Although the court agreed with the applicant's interpretation of the Nonyane order, it did not find the respondents

to be in contempt. In the result, the alternative relief was granted in the following terms:

'The first respondent, through the second respondent, must instruct its attorneys of record within 3 (three) days of this order being granted, to pay over to the applicant the amount received from Fundi Capital (Pty) Ltd in compliance with the order granted on 17 February 2020 by Nonyane AJ under case number 94789/2019'.

[3] The respondents applied for leave to appeal the order granted by this court. The application for leave to appeal was dismissed. The respondents subsequently applied to the Supreme Court of Appeal for

leave to appeal. The outcome of this application for leave to appeal is pending.

[4] The applicant issued an application in terms of section 18(1) and (3) of the Superior Courts Act, 10 of 2013 (the 'Superior Courts Act'). The applicant seeks that the order handed down on 6 August 2021 not be suspended pending finalisation of the application for leave to

appeal, but that the respondents be ordered to pay over the sums of R2 996 353,73 and R579 110,50 into the trust account of their

attorneys of record pending the finalisation of the application for leave to appeal to the Supreme Court of Appeal and any further

applications for leave to appeal that the respondents may institute thereafter.

The parties' respective cases

(i) The applicant's case

[5] The applicant seeks an order that the funds in question be retained in their attorneys of record's trust account pending the finalisation of the application for leave to appeal against the following

background:

5.1. The applicant has not obtained suitable redress since the judgment was handed down in its favour in August 2021;

5.2. Unbeknown to the applicant or the court, the respondents' attorney of record has already paid over the funds in question to the second respondent prior to the court handing down its order on 6 August

2021. This fact was not disclosed to the court when the matter was argued;

5.3. Despite the existence of the Nonyane' and Van der Schyff orders, the respondents failed to instruct their attorney of record to pay over the funds received from fundi Capital to the applicant's attorney of record;

5.4. Since the Nonyane and Van der Schyff orders were granted, the cancellation of the lease agreements between the applicant and the first respondent were confirmed;

5.5. The first respondent is indebted to the applicant in the amount of R13 066 242,62. The first respondent does not own any immovable property; since the cancellation of the lease agreement, the first respondent is not generating any income from the occupation of the leased premises by the TUT students; and the applicants hold no security for its claim against the first respondent. The only security the applicant held was the payment arrangement contained in the Nonyane order. The applicant is not the respondents' sole creditor. These factors cumulatively cause that the applicant stands to suffer irreparable harm should the relief prayed for not be granted.

[6] The applicant submits that -

'Given the fact that the funds received from Fundi Capital have been paid out by the Respondent's attorney of record, the only effective order to be granted by this Court will be to specify which amounts should be paid in trust as an instruction by the Respondents to their attorneys of record, as per the van der Schyff order will not suffice under these circumstance'.(sic)

(ii) The respondent's case

[7] The respondents failed to file an opposing affidavit. I postponed the application and provided them with the opportunity to file an answering affidavit together with a condonation application. It is

evident that the failure to file an answering affidavit timeously falls squarely on the respondents' attorneys of record's shoulders.

Taken into consideration the nature of the application I am of the view that it is in the interests of justice to grant the condonation

and consider the answering affidavit.

[8] The respondents raise the question as to whether relief sought in terms of s 18(1) and (3) is available to an applicant who seeks different relief from what was granted in the initial proceedings. They submit that the application falls short of being an application in terms of s 18(1) and (3) of the Superior Courts Act, and that the relief the applicant seeks is legally incompetent and impermissible in law.

Discussion

[9] Section 18 of the Superior Courts Act provides:

'Suspension of decision pending appeal:

- (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
- (2) ...
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.'

[10] Section 18(1) and (3) refer to 'the operation and execution of a decision which is the subject of an application for leave to appeal or appeal'. The order that is currently suspended due to the respondents having filed an application for leave to appeal is the order stated in paragraph 2 above. It is confirmed by now that the respondents' attorneys of record paid out the amounts they held in trust to either the first or second respondent before the Van der Schyff order was granted in August 2021. The respondents' attorneys

of record were not party to the contempt application and no relief was, or is, sought against them. The applicant in this application,

now seeks that the respondents be ordered to pay the amounts that were paid out to them, into the applicant's attorney's trust account pending the finalisation of the appeal. They want to obtain security for the payment of what they deem to be due to them.

- [11] The respondents claim that the relief that the applicant seeks surpasses the upliftment of the suspension of the operation and execution of the order pending the decision of the application of leave to appeal.
- [12] It is common cause that by now, that the lease agreements between the parties were cancelled, and that the money that was supposed to be paid out to the applicant in terms of the Nonyane order, was paid to either the first or second respondent. That it is impractical, if not impossible, to insist on the enforcement of the Van der Schyff order granted on 6 August 2021 as it stands, is conceded in so many words by the applicant. The applicant thus wants this court to grant

an order that would arguably put it in the same position it would have been had the Nonyane - and Van der Schyff orders been honoured.

- [13] I unfortunately have to agree with the respondents' counsel that section 18(1) and (3) does not provide a mechanism through which an aggrieved party can be granted any other or subsequent order that surpasses the implementation of the order that is being appealed. Section 18 merely provides a mechanism through which the automatic suspension of the operation and the execution of the order pending the appeal, is uplifted.
- [14] Had I been aware of the fact that the respondents' attorney of record paid out the funds received in trust contrary to an undertaking that was provided to the applicant's attorneys of record, and in the face of a pending urgent court application, I would have granted a different order on 6 August 2021. Counsel for the applicant submitted that I am still empowered to vary the order granted on 6 August 2021 *mero motu* in accordance with the powers attributed to the court by Rule 42(1). In light of the fact that the order is now the subject of an application for leave to appeal to the Supreme Court of Appeal, I am however of the view that I am restrained to amend or vary the order as granted.
- [15] Attorneys of record and counsel should never lose sight of the fact that they are officers of the court and they owe the court an ethical duty. By not informing the court during the hearing of the urgent court application that the funds in question were already paid out to the respondents, despite a prior undertaking to keep such funds in a s78 2(A) investment account pending the determination of the dispute by the court, on face value, constitutes a serious breach of such

ethical duty.

ORDER

In the result, the following order is made:

1. The application is dismissed.
2. Each party is liable for their own costs.

3. This judgment together with the section 18 application and all supporting documentation are to be delivered to the Chairperson of the Legal Practice Council for an investigation into the respondents' legal representatives' conduct.

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on Caselines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 15 November 2021.

Counsel for the applicant:

Adv. L W De Beer

Instructed by:

Pretorius Le Roux Inc.

Counsel for the respondents: Adv. M R Maputha

Instructed by:

Kholisile Lumka Attorneys

Date of the hearing:

11 November 2021

Date of judgment:

15 November 2021

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